

Water Issues in the Lower Rio Grande —July 2012
Water and Natural Resources Committee
Steven L. Hernandez, Esq.
Attorney for Elephant Butte Irrigation District

- Lower Rio Grande Stream Adjudication-Stream System Issue 104. Upon the settlement of SS 101 which set forth the Farm Delivery Requirement and Consumptive Irrigation Requirement for irrigation in the valley, the court has turned its attention to the next major issue. What is the source or sources of water for the Rio Grande Project?
- State position on groundwater vs. Bureau of Reclamation position are at the extremes.
- The state and the city start this latest round of litigation by filing a motion that the US can own no groundwater rights that can be part of the Rio Grande Project.
- As anyone in the adjudication could predict, the United States responds by filing a motion that Rio Grande Project Supply includes all hydrologically related ground water.
- EBID position is that both parties miss the point! The reality is that groundwater is hydrologically related to the surface water and that some amount of groundwater makes up the supply that EBID recaptures in its structures and that it continually re-distributes to its members in NM.
- EBID will argue before the court on Wednesday that the parties need to proceed to answer the question originally before the court.
- EBID argues that getting into a battle between the state and United States over the ownership issue and slicing it up before we know what the entire pie is a waste of time and money.
- The ownership of water rights in a Reclamation Project has already been decided by Judge Byrd in the Pecos Adjudication for the Carlsbad Reclamation Project.
- In that case Judge Byrd ruled that the United States and the irrigation district do not own the water right but instead own an interest in the water. However, that interest can be recognized by the state in the adjudication.
- This issue is important to the Texas irrigation district because it wants to make sure that these waters that are diverted, captured and re-diverted are protected by some court order.
 - EBID is also concerned especially in light of recent litigation with the OSE.
 - OSE recently illegally granted a permit to Charles Johns and Sunland Park without the proper notice and protest period. The water was intended to serve the construction of the Intermodal Facility at Santa Teresa. Judge Arrieta issued an Order finding the action illegal after the fact and the application was withdrawn.
 - The inchoate rights on which the Sunland Park/Santa Teresa development is based are indicative of a hydrologic shell game to encourage economic development in the area without an explicit need to keep senior water users whole. This ultimately will (and has) lead to litigation that is far more expensive and counter-productive than taking care of depletions on the river up front with a real replacement plan of vested water rights acquired through a market-based process.
 - EBID is investigating how many other permits may have been granted in the same manner.